taxnotes®

state

Volume 106, Number 12 ■ December 19, 2022

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Reprinted from *Tax Notes State*, December 19, 2022, p. 1093

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In this installment of Noonan's Notes, Noonan and Lawrence review the New York Appellate Division's decision in *Matter of Obus v. Tax Appeals Tribunal* to strike down the state's attempt to hold a New York vacation home used by a New Jersey resident as a "permanent place of abode" for tax residency purposes.

Like Netflix subscribers eagerly anticipating the next episode of a hit series, practitioners like us are always on alert for new developments in one of New York's long-running tax dramas: namely the saga of vacation homes and income tax residency. We got our dose this summer with the New York Appellate Division's decision in *Matter of Obus*,[1] a decision that — at least for now — drastically changes New York's residency rules as applied to vacation-home owners who don't otherwise "live" in the state. We showcased this case as one to watch in the 2019 year-end issue of *Tax Notes State*,[2] and we're doing it again here in 2022 since, as of press time, New York's high court has not determined whether it will grant leave to appeal.

Spoiler alert: In *Obus*, the appellate division struck down New York's attempt to hold an upstate New York vacation home used by a New Jersey resident for only two to three weeks a year as a "permanent place of abode" for tax residency purposes — reversing an income tax assessment that treated him as a full income tax "resident" of New York. In doing so, the court made it clear that the determination of whether a vacation home in New York can constitute a permanent place of abode (one of two requirements to hold a non-domiciliary as a resident for tax purposes) is not merely an objective question whether the home *could* be used for more than vacations, but whether the home was, in fact, used as a "residence."

We hate to say it, but we told you so![3]

New York's Vacation Home Saga — Season One: *Barker*

This vacation home debate — and how it factors into determining tax residency — began a decade ago with *Matter of Barker*.[4] The facts in *Barker* differed little from those 11 years later in *Obus*: In *Obus*, the taxpayers' permanent home was in New Jersey, but the couple also maintained a five-bedroom home in upstate New York that

[1] *Matter of Obus v. New York State Tax Appeals Tribunal*, 206 A.D.3d 1511 (3d Dept. 2022).

[2] Timothy P. Noonan and Joshua K. Lawrence, "Looking Ahead in New York Taxes: Ending the Vacation Home Debate," *Tax Notes State*, Dec. 16, 2019, p. 927.

[3] *Id.* at p. 930 ("Given *Gaied*'s requirement that a residential interest in a dwelling exist before it can be held a permanent place of abode, can a vacation dwelling owned by a commuter, located hundreds of miles away from his office and used no more than three weeks a year, still make a person a resident of New York?").

[4] N.Y. Tax Appeals Tribunal, Jan. 13, 2011. The authors litigated this case on behalf of the taxpayer.

was used solely for winter and summer vacations, no more than three weeks total per year. Mr. Obus also worked in New York, commuting to and from New Jersey to an office more than 200 miles from the vacation home. The commute resulted in his being present in New York for more than 183 days in the years at issue. Similarly in *Barker*, the taxpayers lived in Connecticut but maintained a more modest beach house on Long Island, which was used solely for summer vacations — again no more than several weeks per year. Like the taxpayer in *Obus*, Mr. Barker commuted to and from a New York City office, in this case nearly 100 miles from the beach home, putting him over the requisite 183 days in New York independent of any time spent at the beach home.

In both cases, the New York Division of Tax Appeals held the taxpayers as statutory residents of New York, by virtue of being present in the state for more than 183 days per year in the aggregate and maintaining a permanent place of abode in the state — the two requirements for a non-domiciliary to be taxed as a resident individual of New York for income tax purposes under Tax Law section 605(b)(1)(B).[5] Since neither taxpayer could avoid 183 days of presence in New York based on their commuting pattern, the central question in both cases was whether their seldom-used vacation homes, located 100 miles or more from their workplaces, constituted permanent places of abode. Although the question was the same in both cases, another development in the intervening years drastically changed the framework for analyzing the question — namely, *Matter of Gaied*,[6] a statutory residency decision by the New York Court of Appeals.

To understand the *Obus* decision and its implications not only regarding vacation homes in New York but also in analyzing statutory residency in general, it's helpful to start at the beginning — with the definition of a permanent place of abode. The regulations define it as "a dwelling place of a permanent nature maintained by the taxpayer, whether or not owned by such taxpayer," which can include "a dwelling place owned or leased by such taxpayer's spouse."[7] The regulations provide an exception, noting that a "mere camp or cottage, which is suitable and used only for vacations, is not a permanent place of abode."[8]

Case law before *Barker* and *Gaied* had established that in construing whether a taxpayer maintained a permanent place of abode, the inquiry as to *permanence* "must encompass the physical aspects of the dwelling place as well as the individual's relationship to the place."[9] The taxpayer in *Barker* argued that this dual approach of looking at not only the structure but also how it was used mandated a subjective analysis of whether a vacation home used solely for short vacation stays, unrelated to the taxpayer's commuting presence in New York, could truly constitute a permanent abode for purposes of tax residency. But the tax appeals tribunal in *Barker* rejected the idea that the taxpayer's *use* of an otherwise objectively suitable dwelling had any relevance to the inquiry. It held that the "relationship to the place" requirement related solely to "the proposition that a permanent place of abode may be found whether the taxpayer bears no legal right or relationship to the property." The tribunal went on to apply a purely objective standard, looking solely at the physical attributes of the taxpayer's beach house:

> We reject petitioners' argument that the subjective use of a dwelling by a taxpayer is determinative of the permanent place of abode question. It is well settled that a dwelling is a permanent place of abode where, as it is here, the residence is objectively suitable for year round living and the taxpayer maintains dominion and control over the dwelling. . . . As we stated in [*Matter of Roth*, N.Y. Tax Appeals Trib., March 2, 1989], "[t]here is no requirement that the petitioner actually dwell in the abode, but simply that he maintain it."[10]

[5] Under N.Y. Tax Law section 605(b)(1)(B), a "resident individual" includes an individual "who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than [183] days of the taxable year in this state."

[6] *Matter of Gaied v. Tax Appeals Tribunal*, 22 N.Y.3d 592 (2014). The authors also represented the taxpayer in this case.

[7] N.Y. Comp. Codes R. & Regs. tit. 20, section 105.20(e)(1).

[8] *Id.*

[9] *Matter of Evans*, N.Y. Tax Appeals Trib., June 18, 1992, *confirmed Matter of Evans v. Tax Appeals Tribunal*, 199 A.D.2d 840 (3d Dept. 1993).

[10] *Matter of Barker*, N.Y. Tax Appeals Tribunal, Jan. 13, 2011.

For several years, New York was thus left with an administrative standard under which, effectively, the mere ownership of a dwelling in the state that was habitable year-round satisfied the permanent place of abode prong of the residency test, regardless of how the taxpayer used the dwelling, whether the taxpayer's time in New York was related to the dwelling, and other relationship factors. In short, for a commuter like Mr. Barker, whose permanent home was outside New York, owning a vacation home — no matter how used — created income tax residency (and often double taxation on worldwide income) in two states.

Season Two: *Gaied*

But the *Barker* standard — at least the notion that a taxpayer need not *live* in a dwelling for it to be considered a permanent place of abode — was short-lived. Just three years later, in 2014, the court of appeals issued its decision in *Gaied*, which turned that notion on its head. Although not a vacation home case, *Gaied* involved a New Jersey resident who owned a New York apartment that he maintained as a place to live for his elderly parents. Even though the taxpayer's own use of the apartment was limited to occasional overnight stays to assist his parents (and sleeping on the couch on those occasions), the tax department insisted that the combination of the taxpayer's ownership of and access to the apartment rendered it a permanent place of abode. The tax appeals tribunal agreed and upheld the assessment of tax against the taxpayer as a resident of New York, since he also exceeded the 183-day threshold by virtue of a New York business he oversaw. The court of appeals unanimously disagreed, however. And in rejecting the tribunal's rigid view, the court turned directly to the legislative history of New York's statutory residency provisions, and its own prior decision in *Matter of Tamagni*[11] — which played no role whatsoever in *Barker*:

> In [*Tamagni*] this Court examined the legislative history of the tax statute, and noted that there had been "several cases of multimillionaires who actually maintained homes in New York and spend ten months of every year in those homes . . . but . . . claim to be nonresidents" [citation omitted]. We explained that the statutory residence provision fulfills the significant function of taxing individuals who are "really and [for] all intents and purposes . . . residents of the state" but "have maintained a voting residence elsewhere and insist on paying taxes to us as nonresidents." "In short, the statute is intended to discourage tax evasion by New York residents."[12]

Based on that legislative intent, the *Gaied* court found no rational basis for the tribunal's holding — mirroring that in *Barker* — that "a taxpayer need not 'reside' in a dwelling, but only maintain it, to qualify as a 'statutory resident.'"[13] Rather, as the court of appeals explained, "the legislative history of the statute, to prevent tax evasion by New York *residents*, as well as the regulations, supports the view that *in order for a taxpayer to have maintained a permanent place of abode in New York, the taxpayer must, himself, have a residential interest in the property*."[14] The court therefore held that the taxpayer, who had no living arrangements in an apartment he maintained for his parents, did not have a "residential interest" in the dwelling, so he couldn't be deemed a New York resident by virtue of maintaining a permanent place of abode.

Gaied unquestionably changed the playing field for analyzing statutory residency. It dispensed with the notion, traceable chiefly to *Barker*, that a taxpayer's relationship to a dwelling was irrelevant if the taxpayer had a legal right to it and it was objectively habitable. As the *Gaied* court declared, "in order for an individual to qualify as a statutory resident, there must be some basis to conclude that the dwelling was used as the taxpayer's residence."[15]

Season Three: *Obus*

After *Gaied*, the burning question was how this new framework would affect the vacation

[11] *Matter of Tamagni v. Tax Appeals Tribunal*, 91 N.Y.2d 530 (1998).

[12] *Gaied*, 22 N.Y.3d at 597, quoting *Tamagni*, 91 N.Y.2d at 55, quoting Mem. of Income Tax Bureau, Bill Jacket, L. 1922 ch. 425.

[13] *Gaied*, 22 N.Y.3d at 598.

[14] *Id.* (emphasis added).

[15] *Id.*

home debate. Well, at least we thought the question was burning. *Gaied* involved a unique set of facts, and it remained unclear how the new requirement of a residential interest would be viewed in the case of a vacation home.

Enter *Obus*. The vacation home in *Obus* was not a modest abode. It had five bedrooms and three bathrooms, as well as an attached apartment that was rented out year-round. But Mr. Obus visited the upstate home only for several vacations per year — during the winter for skiing and during the summer to attend horse races in Saratoga. Those visits to the home totaled less than three weeks per year.

Having been assessed as a statutory resident of New York, the taxpayer appealed to the division of tax appeals, arguing that his sparse use of the upstate home did not create the residential interest required by *Gaied*. But both an administrative law judge and the tribunal upheld his assessment as a New York resident. The tribunal acknowledged that its precedent from *Barker* was wrong in light of the *Gaied* decision, but nonetheless held that the residential interest requirement from *Gaied* was met when the taxpayer owned and had full access to his vacation home. The tribunal interpreted *Gaied* as requiring only that the taxpayer had a residential interest *himself* in the place (that is, it was available for use as a residence for the *taxpayer* and not someone else) and that even occasional use constituted an exercise of a residential interest in the dwelling:

> Petitioners' Northville home constituted a permanent place of abode. The dwelling exhibited physical characteristics making it suitable for year-round habitation. Petitioners owned the Northville home and stayed there occasionally for vacation purposes. We thus find that petitioners maintained a permanent place of abode in their Northville home by using it as a vacation home, thereby exercising their residential interest in the dwelling.

The New York Appellate Division, however, disagreed and canceled the assessment. Like the court in *Gaied*, the appellate division considered the legislative history of New York's statutory residency provisions and the stated purpose therein of "taxing individuals who are really and for all intents and purposes residents of the state" but are attempting to evade tax by claiming residence elsewhere. In light of that, the court found the tribunal's focus chiefly on the objective factors "unreasonable." Looking at all the facts and circumstances, the court held that although the spacious upstate home could not be called a "mere camp or cottage" under the regulations and that objective facts existed to support the tribunal's determination (including the taxpayer's "free and continuous" ability to access the home), it was not a permanent place of abode making the taxpayer a resident of New York.

Among the factors highlighted by the appellate division were the sporadic usage (no more than three weeks per year), the fact that the taxpayer did not keep clothing and personal belongings there, and importantly, that the home (a four-hour drive from New York City) was not used for or suitable for access to the taxpayer's job in the city. In light of the history and purpose of statutory residency, the court found ultimately that the taxpayer fell "outside the purview of the target class of taxpayers who were intended to qualify as statutory residents":

> Based on these undisputed facts, petitioners have not utilized the dwelling in a manner which demonstrates that they had a residential interest in the property. . . . Thus, even though the Northville home could have been used in a manner such that it could constitute a permanent place of abode within the meaning of Tax Law section 605, because petitioners did not use it in this manner, it does not constitute a permanent place of abode . . . and a contrary finding by the Tribunal is inconsistent with the legislative intent underlying the statute.

So the *Obus* decision is significant not only for rejecting a narrow interpretation of *Gaied*'s residential interest requirement, but also for making sure that the original intent of statutory residency is considered when looking at the significance of a second home in New York for income tax purposes. And although the appellate division was careful to couch its analysis as a facts and circumstances approach, the import of the

decision is clear: Minimal usage of a vacation home, unconnected to the taxpayer's work (or other reasons for exceeding the 183-day threshold), was not intended as a trigger for residency in New York.

The Cliffhanger

As with any good serial, we're left with a cliffhanger. The tax department has applied to the court of appeals for leave to appeal the *Obus* decision. Will the court take the case? There is no appeal "as of right" in this case, so unless New York's high court sees something amiss with the *Obus* rationale — which in our opinion aligns neatly with its 2014 decision in *Gaied* — *Obus* and its rationale will stand.

If the court denies the tax department's appeal, the department will have some tough decisions to make about the ramifications of the court's rationale. Namely, just as the court in *Gaied* focused on the legislative history underlying the statutory residency tests (that is, to tax people who really are residents), the *Obus* court similarly focused on directing the rules to "the target class of taxpayers who were intended to qualify as statutory residents." Thus, the use of the statutory residency rules to treat taxpayers with tenuous residency-based connections with New York will have to be reexamined, and probably not just for vacation home cases.

One possible ending? Maybe the department or Legislature ends up reconsidering legislation that has been proposed in three different legislative sessions since the *Barker* decision came out, legislation that was designed to exclude vacation home owners from the purview of resident-based taxation. Under that proposed legislation, a second home would be excluded from being considered a permanent place of abode if it were located more than 50 miles from the taxpayer's primary place of employment and used for less than 90 days in a tax year.[16] A return to that type of proposal might end up being in the best interests of both the department and taxpayers. For taxpayers, it would clarify once and for all that vacation home owners who really *aren't* residents of New York do not have to worry about dual-resident taxation (and the double taxation it often creates). And for the tax department, that approach arguably could insulate it from further expansion of the *Obus* rationale to all sorts of varying factual circumstances in which taxpayers are sure to argue that their tenuous connections to New York no longer justify resident taxation.

For now, though, we'll be waiting for Season Four! ■

[16] *See* N.Y. Legis. S3998C. Reg Sess. 2011-2012; N.Y. Legis. Assembly A6266C. Reg. Sess. 2011-2012; N.Y. Legis. S. S3642A. Reg. Sess. 2013-2014; N.Y. Legis. Assembly A4677. Reg. Sess. 2013-2014; N.Y. Legis. S6860. Reg. Sess. 2017-2018; and N.Y. Legis. Assembly A8610 Reg. Sess. 2017-18.